DOCUMENT RESUME

ED 276 117 EA 018 954

AUTHOR Frels, Kelly; Schneider-Vogel, Merri
TITLE The First Amendment and School Employees: A Practical Management Guide. How to Prevent the First Amendment Case--Suggested Actions and Forms Applying the First Amendment Standards to the School Environment.
INSTITUTION National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE 86
NOTE 28p.
AVAILABLE FROM Publication Sales, National Organization on Legal Problems of Education, 3601 S.W. 29th, Suite 223, Topeka, KS 66614 ($7.95 plus $1.50 postage and handling, prepaid; actual cost of postage and handling will be added on billed orders).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Guides - Non-Classroom Use (055)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Administrator Responsibility; *Conflict Resolution; Constitutional Law; Court Litigation; Educational Change; Elementary Secondary Education; Employer Employee Relationship; *Freedom of Speech; Government School Relationship; Legal Problems; Legal Responsibility; Personnel Management; *School Law; *School Personnel
IDENTIFIERS *First Amendment

ABSTRACT

This guide reviews legal standards inherent in the First Amendment and recommends management techniques that ensure employees' free speech rights while maintaining school efficiency. Section 1, "Introduction," presents an overview of the trend toward litigation in which public employees allege that school officials have violated First Amendment rights. "The First Amendment Standards in School Employment," section 2, applies Supreme Court holdings to the school environment. Section 3, "The Usual First Amendment Case," explores the reasons employees normally sue--perceived unfair or undignified treatment. "Preventing the First Amendment Case," section 4, recommends that officials avoid circumstances that lead to lawsuits. The section investigates leadership, employees' rights, evaluation and documentation, and the grievance process. Section 5, "Potential First Amendment Pitfalls," evaluates problem areas in management decisions, including the chain of command and employee civil disobedience. "Evaluating and Executing Adverse Employment Decisions," section 6, reviews processes involved when a supervisor terminates an employee engaged in a free speech activity. Section 7, "Summary and Conclusion," suggests that administrators establish an environment of fair treatment and that supervisors respond immediately to employee needs. Three appendices are included. (CJH)

The First Amendment and School Employees: A Practical Management Guide

ED276117

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

T. Jones

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

EA 018 954

This monograph is not intended or offered as legal advice, and the reader is advised to seek counsel from his or her attorney on matters relating to specific legal issues which arise within the scope of this monograph.

Copyright© 1986

National Organization on Legal
Problems of Education
Printed in U.S.A.

The First Amendment and School Employees: A Practical Management Guide

KELLY FRELS

MERRI SCHNEIDER-VOGEL

How to Prevent the First Amendment Case—
Suggested Actions and Forms
Applying the First Amendment
Standards to the School Environment

NOLPE

National Organization on Legal Problems of Education
Southwest Plaza Building
3601 S.W. 29th Street Suite 223
Topeka, Kansas 66614

About the Authors

Kelly Frels is an attorney and a partner in the firm of Bracewell & Patterson in Houston, Texas. His firm represents numerous school districts and junior colleges, and his practice is concentrated in education law and employment discrimination. He has served on the board of directors and as president of NOLPE. He has served as chairman of N.S.B.A. Council of School Attorneys, and has published numerous articles in a variety of legal publications as well as participating in numerous conventions and workshops.

Merri Schneider-Vogel is an associate in the law firm of Bracewell & Patterson of Houston, Texas, practicing school law. She received her law degree from the University of South Carolina and was formerly a special education teacher. She previously served as a managing editor of the *Journal of Law and Education.*

Contents

I. Introduction

II. The First Amendment Standards in School Employment

III. The Usual First Amendment Case

IV. Preventing the First Amendment Case
- A. The Role of the Immediate Supervisor—Leadership
- B. Recognition of the Employee's Rights Under the First Amendment
- C. Effective Evaluation and Documentation
- D. Using the Grievance or Complaint Process for Resolving First Amendment Claims

V. Potential First Amendment Pitfalls
- A. The Chain of Command
- B. Employee Civil Disobedience
- C. Cleaning Up An Out-of-Control School or School District

VI. Evaluating and Executing Adverse Employment Decisions
- A. Conference With the Employee Before Recommending Termination
- B. Hearing of the First Amendment Issues Before the Board or Hearing Officer

VII. Summary and Conclusion

Appendix A—Memorandum Recognizing First Amendment Rights and Process to Reduce Problems

Appendix B—Memorandum Recognizing First Amendment Rights and Directive to Perform Assigned Duties

Appendix C—Grievance and Complaint Definitions and Concerns Policy Which Include the First Amendment Allegations

I. Introduction

There has been a discernible trend in litigation toward suits in which public employees allege that school officials have violated an employee's first amendment rights of speech or association. What may recently have been a basic racial or sexual discrimination case may now take on a totally different flavor with the addition of a claim that the employee has suffered recriminations because of some free speech activity.[1] The frequency of these claims in public employment cases can be attributed in large part to creative lawyering and a broadening by the courts of the reach of the first amendment into government actions by the courts.

The constant presence of first amendment considerations in school management decisions has caused considerable anxiety among school administrators and board members. The standards for applying the first amendment have been subject to continued development and change by the courts.[2] Holdings in many first amendment cases appear contradictory. School officials and board members are frequently uncertain about how to apply the results of these cases, not only in an effort to provide an orderly and efficient school environment where learning can take place, but to avoid personal liability. Numerous excellent articles have been written that analyze the legal principles of the first amendment,[3] but no effort has been made to examine the practical day-to-day application of free speech activities. Likewise, there is no guide available to suggest management techniques to aid school officials in operating their schools, while insuring that their employees enjoy their free speech rights guaranteed by the first amendment. This monograph is an effort to fill that void.

The basic legal standards inherent in the first amendment are reviewed to insure a basic understanding of first amendment principles. Elementary management issues impacted by the first amendment will be discussed, and finally, suggestions concerning how administrators can effectively operate the school while recognizing first amendment rights are suggested. Specimen letters and policies which may be helpful are included in the appendices. A word of caution is in order in that this monograph is not legal advice, and school officials should confer with their legal counsel on particular speech issues.

---

1. These recriminations need not reach the level of termination. Riechert v. Braud, 701 F.2d 1168, 1172 (6th Cir. 1983) (altered employment conditions); Solis v. Rio Grande Indep. School Dist., 734 F.2d 243 (5th Cir. 1984) (no assignment to teach summer school); Bowman v. Pulaski County Special School Dist., 723 F.2d 640 (8th Cir. 1983) (reassignment); Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982) (denial of promotion).

2. Weiman v. Updegraff, 344 U.S. 183 (1952) (association); Shelton v. Tucker, 364 U.S. 479 (1960) (loyalty oath and association); Keyeshian v. Board of Regents of the Univ. of New York, 385 U.S. 589, (1967) (speech and association); Pickering v. Board of Educ. of Township High School Dist. 205, 391 U.S. 563 (1968); Perry v. Sindermann, 408 U.S. 593, (1972) (speech in absence of tenure); Givhan v. Western Line Consol. School Dist., 439 U.S. 410, (1979) (private conversation on the public issue of alleged racial discrimination protected).

II. The First Amendment Standards in School Employment

As the courts expanded the breadth of the first amendment, standards began to evolve that offered some guidance to public employers on how to carry out governmental functions while recognizing employees' emerging first amendment rights. The seminal case which established the basic standards was *Pickering v. Board of Education*[4] in which the United States Supreme Court first introduced the concept of balancing a public employee's free speech rights against a school's interest in maintaining an efficient operation. The Court also articulated the concept that for speech to be protected, it must concern an issue of public interest. Specific factors which the Court in *Pickering* held were relevant in balancing the free speech rights of the individual against the responsibility of government to function efficiently included the degree to which the speech: (1) interfered with employee performance and operation; (2) created disharmony among co-workers; (3) undercut an immediate supervisor's discipline over an employee; and (4) destroyed the relationship of loyalty and trust required of confidential employees. This balancing was and is ultimately, of course, a matter of law for the court to decide rather than a question of fact for a jury.

Applying the *Pickering* standards has been difficult in the complex environment of public schools and colleges. As the impact of the first amendment has broadened, the number of lawsuits has likewise increased. Employees who were experiencing performance problems could build an effective shield from discipline or termination by simply engaging in a speech or joining a union. Employees using first amendment rights to avoid legally acceptable negative employment action subverted the purpose of the first amendment's protection of speech.

In an apparent effort to refocus the application of the first amendment in the public employment arena, the Supreme Court added another job-related inquiry in *Mt. Healthy City School District Board of Education v. Doyle*.[5] In *Mt. Healthy*, the Court emerged with a three-part test to determine whether a public employee had been deprived of his or her first amendment rights, or whether the employee was simply

---

3. *See generally* Comment, Connick v. Myers: *Narrowing the Free Speech Rights of Public Employees*, 33 Cath. U. L. Rev. 429 (1984); Pittman, *Supreme Court Restricts First Amendment Rights of Public Employees*, 58 Tul. L. Rev. 831 (1984); Joyce, *Constitutional Protection for Teachers and Other Public Employees*, 16 Sch. L. Bull. 6 (1985); Delon, *Coping Legally With Teachers' Criticisms*, 9 NOLPE Sch. L.J. 99 (1981); Mawdsley & Permuth, *Free Speech and Public Education: An Overview of Legal, Social and Political Issues*, 16 St. Mary's L.J. 873 (1985); Bernheim, *Free Speech for Public Employees: The Supreme Court Strikes A New Balance*, 17 Sch. L. Bull. 8 (1986).

4. 391 U.S. at 563.

5. 429 U.S. 274 (1977).

using the first amendment to avoid being disciplined for lawful reasons. The first prong of the test, which is for the court to determine as a matter of law, is whether the speech related activity was protected by the first amendment. A part of the court's inquiry is to apply the balancing test of *Pickering*. If the court determines that the teacher had engaged in a protected speech activity, it is then the responsibility of the jury to decide the factual issue of whether that speech activity was a substantial or motivating factor in the school official's decision to terminate the teacher or alter the teacher's job conditions. If the jury answers "yes" to the motivation question, the jury is then required to apply the third part of the test by determining whether the teacher would have been terminated regardless of the exercise of the first amendment rights. If the jury's answer to this question is "no," the teacher wins, but if the answer is "yes," the school officials win.

The Court in *Mt. Healthy* reasoned that the imposition of this test should prevent teachers and other public employees from shielding their inadequacies under the guise of first amendment activity. On the other hand, public employees who are performing satisfactorily could continue to speak out on matters of concern to them. This test did bring some balance to the application of the first amendment, but as a practical matter, whenever a jury determines that the protected speech activity was a substantial or motivating factor for the termination, the jury almost uniformly finds that the teacher would not have been terminated for other lawful reasons. The proliferation of first amendment cases filed in the courts continued.

In 1983, the current standard for applying the first amendment in the public employment context was established in *Connick v. Myers*.[6] In *Connick*, an assistant district attorney, who was denied a reassignment, sent out a questionnaire in the form of an interoffice memorandum. She asked questions about employee morale, transfer procedures, the need for a grievance committee, and whether there was pressure to contribute to political campaigns. In finding that the memorandum was not a speech activity protected by the first amendment, the United States Supreme Court expanded on the requirement that the speech-related activity must be on a matter of "public" as opposed to one of "private" concern, first mentioned in *Pickering*.

In determining whether the speech concerns a public issue rather than a private one, the court, as a matter of law, must examine the content and form of the speech in the context in which it is made. If the speech is found to concern a private matter, the issue of free speech is concluded in favor of the defendant school official; however, if the court finds that the speech was on a public subject, the court must then examine the speaker's relationship with others affected by the speech and apply the balancing test of *Pickering* reviewed above. In making this legal

6. 461 U.S. 138 (1983).

determination, the court must again look at the place and manner of the speech as well as the context in which the speech activity was undertaken. If the court finds the value of the speech as a comment on an issue of public concern is outweighed by the interests of the school district in maintaining an efficient operation, the school officials win on the speech issue. If not, the speech issue will be presented to the jury for a factual finding under *Mt. Healthy*. The jury will determine whether the protected speech was a substantial or motivating factor in the school district's decision to alter the teacher's employment status. If the answer to this question is "no," the defendant school official prevails, but if this substantial or motivating factor question is answered in the affirmative, the jury then must answer the question whether "but for" the speech would the employee's status have been altered. If this question is answered "yes," the defendant school official wins, however, should it be answered "no," the employee wins.

What constitutes a speech activity on a matter of public as opposed to one of a private concern has, as would be anticipated, been a matter of considerable litigation in the lower courts. Standards for determining whether speech involves a public concern or a private concern continue to evolve. Some emerging principles include whether the individual spoke out only in his or her personal interests rather than in behalf of the interest of the community at large, and the absence or presence of public concern in the community with the issue on which the employee has spoken out. Whether an employee's speech addresses a matter of public concern must be answered in light of the content, form, and context of a given statement as revealed by the whole record. Additionally, several lower courts have addressed specific first amendment issues, and have concluded that they amount to an issue of personal concern rather than an issue of public concern. These include the specific salary that an individual receives; the particular courses to which an individual is assigned; matters relating to internal college affairs such as a proposed curriculum or the manner in which the proposed curriculum is adopted; and the decision to grant or deny tenure to an individual. By and large, grievances filed by an employee have been held not to constitute a matter of public concern such that the first amendment would protect such speech.[7]

---

7. Examples of public issues are illustrated by: Knapp v. Whitaker, 577 F. Supp. 1265 (C.D. Ill. 1983), *aff'd*, 757 F.2d 827 (7th Cir. 1985) (employee mileage allowance, teacher liability insurance coverage); Holly v. Seminole School Dist., 755 F.2d 1492 (11th Cir. 1985) (political activities of employees to alter selection process for superintendent); Solis v. Rio Grande Indep. School Dist., 738 F.2d 243 (5th Cir. 1984) (teacher support for school board candidates); McBee v. South Pemiscot School Dist. R-V, 712 F.2d 339 (8th Cir. 1983) (letter to newspaper on a private issue which became associated with a bond election).

Examples of private issues are illustrated by: *Connick*, 461 U.S. 138 (employee transfers, need for employee grievance committee, confidence in supervisors); Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir. 1984) (employee grievances which in themselves do not relate to matters of public concern); Rowland v. Mad River School Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1373 (1985) (statement of employee to school officials by

One additional issue may be present in a first amendment case. This relates to whether the otherwise protected speech was so disruptive and its value was so overbalanced by the need for government order and efficiency that it was no longer protected by the first amendment. This is a difficult and tricky inquiry because it requires a determination of whether the speech activity actually caused a material and substantial disruption of the school's environment.

The disruption inquiry was complicated by the *Connick* Court's introduction of the concept that some issues may not be a matter of pure public concern but may be one of a limited public concern. Whether matters of limited public concern are protected depends upon the context in which the speech is exercised. In *Connick* the limited public concern question concerning pressure to contribute to campaigns was but one among several other questions that were obviously personal. For this reason, the entire speech activity was not protected. A reasonable belief on a matter of limited public concern by a school official that disruption will occur in all that is required to remove its protected status. Actual disruption is required to remove the protected status of speech on matters that are of public concern. The courts have not clearly defined how to apply either "disruptive" test, so the application of these tests in real life situations must be undertaken with great care.

III. The Usual First Amendment Case

The usual first amendment case involves a not-so-perfect teacher who either has not been evaluated or whose performance has been found acceptable by his or her supervisor over some period of time. This situation often arises in schools in which the principal or department chair exerts little or no leadership. The supervisor may have verbally told the employee about some performance problem, or he or she may have been the recipient of parental complaints about performance. The supervisor, however, did not memorialize the problems by preparing a memorandum or by noting the deficiency in an evaluation document. In other words, the supervisor failed to effectively deal with the issues of the employee's performance. The employee then participates in some speech related activity such as a presentation to the school board or active participation in a labor union or community public interest group.

These speech related activities by the employee then cause the supervisor, some member of the school board, or a member of the central office to focus on the employee's behavior. If the employee's behavior is antagonistic to the school officials' position, the focus invariably turns to whether this employee is a good employee, i.e.,

teacher regarding sexual preference); Derrickson v. Board of Educ. of St. Louis, 738 F.2d 351 (8th Cir. 1984) (disputes with fellow employees, objection to employer's criticism and internal office affairs).

whether the employee has performed satisfactorily. This review often reflects that the employee is performing poorly, and a series of events, including intense documentation of inadequate performance, then occurs. Termination or other negative job action follows. Parental complaints about the teacher from the past are often resurrected and investigated. After the termination, the employee files a lawsuit alleging that his or her protected speech (or associational activity) was a substantial or motivating factor in the school board's decision to terminate.

While the employee's first amendment activity may be a true reflection of his or her feelings, it may also be a staged effort by the employee to become involved in activities which could then shield him or her from a negative job action. Regardless of why the activity was undertaken, it was, and school officials are then faced with the time, effort, disruption, and expense of defending a lawsuit. What caused the employee to file such a lawsuit depends on numerous factors, but experience suggests that employees normally sue because they perceive they have been treated unfairly. Another common reason an employee might file a lawsuit under the circumstances is that the employee perceives that school officials have somehow deprived the individual of the opportunity to preserve his or her personal dignity. Other reasons for employee suits include the influence of friends, unions, and other reasons peculiar to a specific situation. Many times the first amendment issue is raised by an employee on the chance that a jury might focus on the speech-related activity and miss the real reason the employee has been terminated.

IV. Preventing the First Amendment Case

Because the basic reasons employees file lawsuits, including first amendment actions, can often be controlled by school officials, the management objective becomes one of avoiding the circumstances which lead to their being filed.

A. The Role of the Immediate Supervisor—Leadership

In avoiding lawsuits, one must focus on the primary cause of many first amendment suits, the relationship of the employee and his or her supervisor. The supervisor is expected to exert leadership and communicate with those under his or her supervision and identify any issues of concern or need. The supervisor is expected to be a leader and resolve the concerns or needs of the employees when it is within his or her level of responsibility and refer those needs outside the supervisor's authority to a superior. It is when the immediate supervisor fails to provide leadership and perform these responsibilities that the seeds of a first amendment problem are sown. Supervisors should be instructed about

their responsibility to address and resolve problems and to communicate with those under their supervision. Supervisors who fail to do so should be assessed accordingly at evaluation time.

B. Recognition of the Employee's Rights Under the First Amendment

School officials must recognize that employees have first amendment rights and that they can generally speak out on issues of public concern. These free speech rights extend to statements made in private conversations as well as those made in public settings although the time, place, and content in which the speech is made may determine whether it is on a public issue. The speech must, of course, be balanced with the school's interest in maintaining an environment conducive to learning by students. This balancing is difficult enough for courts, but it is even more difficult for supervisors who are in the thick of a controversy when they must make judgments on such important issues. Supervisors must attempt to remove themselves from the controversy and become as objective as possible. The assistance of others, including administrative superiors and legal counsel who are not directly involved in the controversy should be engaged when judgments of this nature are required. Applying the legal standards to a set of real facts is the first critical step in the prevention of a first amendment suit, and it is a step that should not be taken lightly.

C. Effective Evaluation and Documentation

The use of an effective and carefully crafted documentation system is a near essential component of preventing a first amendment case from developing.[8] When there has been a systematic evaluation and documentation of performance in which employees have been honestly rated and informed about existing problems, the chances of a school district or its officials being found guilty of first amendment violations are dramatically reduced. If the weaknesses of an employee's performance are documented historically and not just after the employee engages in a protected activity, the judge or jury will be less inclined to find that the adverse employment action was motivated by the speech related activity.

A practical and useful system of documentation is found in NOLPE

---

8. For a review of the practical aspects of evaluation, *see* K. Frels, T. Cooper & B. Reagan, Practical Aspects of Teacher Evaluation (NOLPE Monograph 1984). For an overall analysis of judicial decisions and legal standards applicable under state laws and in civil rights settings, *see* J. Beckman, Legal Aspects of Teacher Evaluation (NOLPE Monograph 1981), J. Beckham, Legal Aspects of Employee Assessment and Selection in Public Schools (NOLPE Monograph 1985) and J. Beckham, *Legally Sound Criteria, Processes and Procedures for the Evaluation of Public School Professional Employees*, 14 J.L. & Educ. 529 (Oct. 1985). For a more complete review of the practical aspects of documentation, *see* K. Frels & T. Cooper, A Documentation System for Teacher Improvement or Termination (NOLPE Monograph Rev. Ed. 1986).

monograph, *A Documentation System for Teacher Improvement or Termination*.[9] No effort will be made here to fully explain or analyze that documentation system, but the mention of a few basics of documentation are appropriate.

Effective documentation really equates with communication. The cardinal rule of documentation is to conference with the employee first and follow with a written memorandum to summarize the conference. If the issue is important enough to generate an individual memorandum, it is important enough to have a personal conference with the employee involved. In preparing any memorandum, the supervisor should rely on the facts and should avoid conclusional statements. Inflammatory words such as "stupid," 'dumb," and "insubordination" should be avoided. Educational jargon should not be used since laypersons on a school board or jury may eventually be asked to understand the language. Board members, judges, or jurors faced with education jargon may be intimidated, angered, or simply unable to understand the administration's position. The communication should be personalized by using the first person, yet it should be direct and to the point. Memoranda are judged not by their length but by their quality. No communication should be written and sent when the supervisor is upset or angry; however, the writing must be sent soon after the incident or conference to secure the desired effect.

It is advisable to have the employee sign a copy of the memorandum to acknowledge receipt. If the employee refuses, simply have another person sign a statement that the employee was given a copy on a certain date but refused to acknowledge receipt by signing a copy. Each memorandum should recite that a conference was held, the topics discussed, the items agreed upon, and any directions given. The concluding paragraph should offer the opportunity for the employee to submit any disagreement with the contents in writing or to have a further conference to discuss any differences. Several sample memoranda which contain the suggested language are included as appendices to this monograph.

D. Using the Grievance or Complaint Process for Resolving First Amendment Claims

If, after using the management strategies outlined above, an employee complains about retaliation for the exercise of first amendment rights, a process should be available for the prompt resolution of the claim. The claim simply should not be permitted to languish without attention or resolution. An unresolved first amendment claim generally does not resolve itself but only gets worse and includes more employees within its sweep. Many school districts have included allegations of first amend-

9. K. Frels & T. Cooper, *supra*, note 8.

ment violations and other discriminatory acts within their definition of a grievance. Other districts prefer a less formal process for the resolution of these claims. A copy of a grievance definition including first amendment allegations is included as *Appendix C*. The formal grievance process then becomes the procedure available to resolve such claims. The availability of this dispute resolution process is helpful to the employee because it provides an avenue to seek redress, to complain and ventilate. Likewise, the process provides the administrator with a process to insist that the employee follow if the employee claims a first amendment violation. *Appendix A* demonstrates how an administrator can utilize the grievance or complaint process to bring a possible first amendment problem to resolution.

While the courts expect school districts and their administrators to obey established constitutional standards, the courts will generally be deferential to the decisions of school districts where a conscious effort has been made to adhere to constitutional standards. Such adherence to standards can be partially demonstrated by a school district's willingness to provide a process within the school to resolve the claims prior to resort to a court. Once a process is provided, however, school officials must be ready and willing to hear and consider employees' first amendment allegations. If the hearings show that an employee's first amendment rights have been violated, school officials must respond by providing an appropriate remedy for the violation. Normally this remedy includes a cessation of the inappropriate action and a commitment not to undertake the action in the future. Often a memorandum to the offending supervisor containing a directive on future behavior is necessary to set a legal future course of action. The evaluation of these claims depends upon the facts of each case, and the district's legal counsel should be consulted in the evaluation of the first amendment claim and its resolution, if a violation is found.

V. Potential First Amendment Pitfalls

Administrators are continually faced with management decisions which present potential pitfalls to the administrators' efforts to prevent the first amendment lawsuit. These potential problems include the requirement to use the chain of command, the challenge of the civilly disobedient employee, and the challenge presented when an administrator is faced with gaining a hold on the out-of-control school or school district.

A. The Chain of Command

Many school officials are very sensitive to the management concept that employees must follow the chain of command when seeking a resolution to a school problem. This has been one of the most fertile beds of first amendment litigation, and the standards are far from clear. While

some courts may hold that requiring adherence to the chain of command is a valid restriction on time, place, and manner of speech,[10] other courts will find that chain of command requirements are invalid when the employee's speech is on a public issue as opposed to a private matter.[11] Speech related to upholding and enforcing laws by turning in violators of the law is high in the hierarchy of protected speech related activities, and the federal government and many states are now enacting whistle-blowing statutes to provide additional protections.[12] There is nothing that strikes more fear in the heart of a school district counsel than to hear from a school official that "I fired him because he went to a school board member about a problem when I told him not to talk with any school board members."

There is an approach which appears to comply with even the most restrictive of the cases while providing a degree of effective management control. Although this approach has several steps, the essential ingredient is that the immediate supervisor be an effective communicator and willing to assert leadership and assume responsibility. The first step is for the supervisor to recognize that an employee generally has the right to speak out on all issues of public concern, and the supervisor should assume that this right includes the employee's right to speak to school board members about these matters without following the chain of command. The second step involves the supervisor communicating this understanding to the employee while advising the employee that there is an internal process available to resolve issues. The employee should further be advised that the supervisor cannot resolve problems which are not brought to the supervisor and that the supervisor is available and willing to deal with any issue brought to his or her attention. If the supervisor cannot resolve the issue, it will be referred to the next person up the chain. Often it is necessary for the immediate supervisor to present his or her views concerning the employee's concern to the next level supervisor. A third step which is often necessary or desirable is for the supervisor to put steps one and two in a memorandum to the employee after discussing the resolution of the matter. A sample memorandum which contains the essential elements of this approach is included as *Appendix A*.

In order for this system to work effectively, the board of trustees must assume its proper role as a policy-making body rather than as the administrator of those policies. When a board member is approached by an employee about a problem, the board member should receive the

10. *E.g.*, Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983).

11. Anderson v. Central Point School Dist., 746 F.2d 505 (9th Cir. 1984); Knapp v. Whitaker, 577 F. Supp. 1265 (C.D. Ill. 1983), *aff'd*, 757 F.2d 829 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 36 (1985).

12. Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984); O'Brien v. Town of Caledonia, 748 F.2d 403 (7th Cir. 1984); whistle-blower statutes include 5 U.S.C. § 2301(b) (9) (Supp.) and Tex. Rev. Civ. Stat. art. 6252 - 16a (Supp. 1986).

information and refer the employee back to the appropriate member of the administration. In some districts, the superintendent might be designated as the referral person; in others, board members may send the employee directly to the person with authority to see that the problem is resolved. Obviously, if the employee has not attempted to have the matter resolved by his or her immediate supervisor and the supervisor has the authority to resolve it, the supervisor would be an appropriate place to start.

When issues are raised outside the chain of command or internal administrative process by an employee, the immediate supervisor should be directed to conduct and prepare a report on the issues and recommend what steps, if any, should be taken to resolve any problems which might exist. The immediate supervisor should be expected to resolve any issue within his or her level of responsibility. By following this process, the predictable reaction or the desire to retaliate against an employee who speaks out should be avoided.

The concerns or needs of most employees can be met through this verbal communication and an occasional memorandum prepared in accordance with the discussion on documentation above. Occasionally an employee will attempt to set up a supervisor by casually making verbal statements which the employee really wants the supervisor to ignore so the employee can later claim that his or her complaints were disregarded. If this appears to be occurring, the supervisor should either take the initiative to deal with the issue or ask the employee to put such matters of concern in writing. If the employee refuses to put his or her concerns in writing, the supervisor should prepare a memorandum similar to the one exemplified in *Appendix A* to document the request and any action taken.

B. Employee Civil Disobedience

A situation closely akin to the chain of command problem involves an employee who does not like what is going on in the district and who may be at political odds with the administration or the board of trustees. This can occur with all levels of employees: administration, faculty, and classified. Virtually everyone recognizes that employees have the right to disagree with policy matters and take appropriate steps to try to change the policy or philosophy of the board or administration. The problem occurs either when the disagreement is reflected in the employee's performance or when the employee perceives that the supervisor is retaliating against him or her because of the policy or political posture. Just as surely as retaliation for the exercise of protected rights has no place in a school system, civil disobedience is unacceptable, especially when it impairs an employee's effectiveness or hampers the achievement of educational goals. Balancing the rights of the employee with the needs of the school in this setting is especially difficult.

The supervisor should continue to assess the job related aspects of such an employee's behavior and avoid feeling or stating: "It's because of your views that you are not doing your job right." Instead, the supervisor should conference with the employee and acknowledge to the employee that he or she has a right to disagree on policy or political matters, and voice his or her opinion about those issues. The supervisor should then advise the employee that he or she does not have to like the policy or philosophy, nor does he or she have to like the person with whom he or she is dealing, but the employee is hired to perform a job and he or she will be expected to do it. An employee must perform according to the job description and the directives of his or her superiors, so long as the instructions are not directed to an illegal activity. Disagreement with why things are as they are does not justify not doing what one has been directed to do or not performing the task in an acceptable manner. *Appendix B* is a sample memorandum which recognizes the employee's first amendment rights yet directs the employee to perform assigned duties.

C. Cleaning Up an Out-of-Control School or School District

A fertile ground for the germination of a first amendment case is the school or department that has gotten out of control. Generally, an out-of-control school or department is a product of inadequate or poor leadership. Gaining control of the out-of-control situation is a real challenge to even the best of administrators. The same situation is faced by a new superintendent who comes into a school district where the previous superintendent lost control. When a leadership vacuum has been created by a weak administrator, invariably someone has stepped forward to fill the leadership space. In schools this vacuum is often filled by an assistant principal, teacher or secretary, while the void in the superintendency position is usually filled by a board member or an upper level administrator.

An out-of-control school or department usually attracts the attention of the public and the board who become disenchanted and irritated with the state of affairs. When a new administrator is employed to lead the school, department or district, there is a tendency to tell that person to "clean that mess up," even if it means firing people. The new administrator is usually directed to dive into the task. This offers the perfect opportunity for the sprouting of the first amendment case. If the new administrator moves too quickly without getting a feel for the strength of the staff and their alliances, he or she may make irretrievable moves which will lead to his or her failure. These moves may cause the employees to take political stands or seek outside intervention to head off the changes with which they do not agree. Threatened employees often join unions, appear before public bodies, and otherwise engage in protected speech activities. If these employees then suffer adverse job

actions, the first amendment case is up and growing. To the extent that these employees enjoy the support of others at the school for their suit, their chance of prevailing is enhanced. At trial, the teachers will enjoy the full support of a large contingent of the staff while the district and its administration will probably have difficulty in marshalling witnesses to present facts and support its position.

An administrator who is sent into a school to "clean it up" should carefully examine the circumstances before taking strong action. Under no circumstances should the administrator issue initial threats if his or her views are not accepted by the staff. If the staff members who can form the basis of a strong faculty feel threatened, they will support the weak ones who will be subjected to strict scrutiny and possibly face adverse job actions. Instead, the new administrator should determine who the strong staff members are and attempt to have them become participants in a program of change. After the strong staff members accept the changes, the weaker ones normally fall in line, and if they do not, the stronger ones generally feel the weaker ones were given a fair opportunity. A lawsuit filed by the weaker employees will probably not be supported by the stronger and more effective employees. The less support an employee receives from his or her peers for a lawsuit, the less is the chance that it will be filed or fully prosecuted, if one is filed.

VI. Evaluating and Executing Adverse Employment Decisions

Another critical stage in preventing a first amendment case occurs when the supervisor must determine whether to recommend an adverse employment action, such as termination, for an employee who has been or will claim to have been engaged in a free speech activity. When such an employee is considered for termination, a supervisor should be ready to confront the issue head on and articulate the reasons in support of termination.

A. Conference With the Employee Before Recommending Termination

Before a final recommendation concerning an employee's contract status is made to the superintendent, and ultimately to the board of trustees, the supervisor and the supervisor's superior should hold a conference with the employee. The employee should be told of any inadequacies or problems and should be given an opportunity to explain his or her version of the facts. This conference can help clear up misunderstandings concerning the basic reasons for the proposed termination.

The employee should be given the opportunity, and actually should be encouraged, to discuss any speech related issues and any feelings the employee may have that he is being discriminated against based upon

race, religion, ethnicity, age or handicapping condition. If any of these issues are raised, they should be fully discussed. This will give the immediate supervisor and the supervisor's superior an opportunity to consider any additional facts or viewpoints an employee may present, examine the situation more closely, and determine whether termination is the proper alternative.[13]

If, after the conference with the employee, the immediate supervisor and the supervisor's superior determine that a recommendation for termination should be made, it should be prepared. When the recommendation is made the supervisor should also submit an appropriate notification letter of proposed termination listing the reasons supporting the proposed termination for review by the district's legal counsel. The supervisor should also prepare for review by the school district's legal counsel a letter containing a list of the witnesses together with a description of the statements of those who would testify on behalf of the administration at a hearing. The documents which support the reasons for the termination should also be presented for review at this time. After the two letters have been reviewed by the district's legal counsel, a conference of the immediate supervisor, the supervisor's superior, and the attorney to review the file is often very helpful. Any first amendment allegations and other discrimination issues involved in the possible termination should be discussed with the attorney at this time, if they have not been previously reviewed. If the attorney does not ask whether these issues are present, the administrators should volunteer the information. The attorney will then be in a position to evaluate the proposed termination with knowledge of any first amendment or discrimination claims.

B. Hearing of the First Amendment Issues Before the Board or Hearing Officer

By the time a termination reaches the board of trustees or a hearing officer, the first amendment status is generally in one of three categories. The school officials are: (1) aware of the specific first amendment claims by having dealt with them through the grievance process or in the conferences preceding the decision to recommend termination; (2) aware only of vague unsubstantiated claims made by the employee; or (3) not aware of any real or potential claim. It is essential that the issue be confronted and resolved at the hearing on the proposed termination.

If the employee's first amendment allegations are broadly stated and not supported by specific facts, the district's legal counsel or school officials should consider writing the employee's representative that the board or hearing officer intends to fully and completely deal with these allegations and request that he or she supply the administration with a

13. For a more detailed discussion of the conference, *see* K. Frels & T. Cooper, A Documentation System for Teacher Improvement or Termination (NOLPE Monograph Rev. Ed. 1988) at 11-12.

full statement of the facts which support the claim. This accomplishes a dual objective of stating on the record the board's intent to apply constitutional standards, and it attempts to discover the facts in advance of the hearing so the administration can reconsider its position on the termination recommendation or be prepared to rebut the evidence at the hearing. The employee's representative is not required to provide the information about first amendment allegations, but a failure to do so can be cause for the continuance of a hearing, and a future judge or jury can certainly consider the employee's action unreasonable.

Not infrequently the employee's attorney will attempt to raise first amendment allegations for the first time when the lawsuit is filed. As a hedge against this and to force the issue to be heard before the board, many school district attorneys will ask the employee at the termination hearing whether he feels, or is in any way claiming, that the employee has been discriminated against based on race, sex, national origin, age, or handicapping condition, or whether the employee feels the termination is in any way related to first amendment activities such as speech, association with others or union or political activity. If the employee answers "yes" to any of these questions, the facts surrounding the issue can be pursued and resolved by the board.

When the board considers a first amendment claim, it should rely upon the advice of counsel to determine whether the speech related activity is protected. If there is any doubt, the board should assume that it is protected for purposes of applying the substantial or motivating factor test of *Mt. Healthy*. If the board finds that the first amendment activity was not a motivating or substantial factor in the proposal to terminate, that ends the inquiry. If, however, the board determines that the first amendment activity was a substantial or motivating factor, the board then can determine whether there are lawful reasons for which the person could be terminated. However, once the motivation question is answered "yes," a board should be very cautious about proceeding with the termination because a detached judge or jury who considers the case later may find lawful cause lacking. A "yes" answer to the motivation question generally signals the time to consider alternatives to termination.

Should the employee refuse to answer questions concerning first amendment or discrimination claims on his or her own, or at the instruction of an attorney, the school attorney can ask the employee's attorney to stipulate that none of these illegal matters are at issue in this case. Even if the attorney refuses, it makes raising the discrimination claims and first amendment allegations in a lawsuit more difficult. The employee and his or her attorney will certainly be vulnerable to accusations of "lying behind the log," being unfair, and not providing the school board an opportunity to apply the constitutional standards. Courts have been known to remand such cases to the school district for further hearings on the first amendment issue. When boards have heard

the first amendment claims and have dealt with them, courts tend to give considerable deference to their decisions, and courts have been known to grant summary judgments for school districts when allegations and the facts before the courts are the same as those raised before the boards. At the very least, the board's willingness to consider the issues up front will establish an atmosphere of reasonableness which should have a positive impact on the future course of the litigation.

VII. Summary and Conclusion

The application of the first amendment has been and will continue to be a challenge to school officials and attorneys. Even though the standards for analyzing the first amendment claim are somewhat uncertain and are subject to development and clarification, there are certain steps that school officials can take to help prevent the first amendment case from occurring or to place the school and its officials in a better position to prevail should a case be filed.

The first and foremost of these steps is to establish an environment in the school where employees perceive they are treated fairly. This is founded in leadership, good management practices, and effective communication. An effective evaluation and documentation system is essential to achieve this result. Employees should not be placed in positions where they are forced to lose their personal dignity or where other employees feel they have been treated unfairly.

The immediate supervisor must assume a leadership role in responding to employee needs and resolving problems. The first amendment rights of employees should be recognized and respected, but those rights should not be used by an employee to avoid the performance of assigned duties. While internal procedures should be in place to resolve problems, supervisors should recognize that employees can generally discuss public issues with board members. Any first amendment allegations should be resolved promptly within the school district structure, and boards of trustees and hearing officers should not shy away from dealing with first amendment claims. When the school district deals with these issues in a straightforward manner, it gains better control of its destiny. School employees are less anxious to file suits when they perceive they and their fellow employees have been treated fairly. Finally, courts are reluctant to overrule or second-guess the decisions of governmental bodies when their resolution process appears fair and reasonable.

APPENDIX A

Sample Summary Memorandum (Recognizing First Amendment Rights and Process to Resolve Problems)

To: Paula Public

From: Don DoRight

Date: September 16, 1986

Re: Conferences of September 14-15, 1986

On September 14 and 15, you and I had conferences in my office to discuss the concerns you had expressed at the school board meeting on September 13. At that school board meeting you stated concerns about faculty members at Iceland Elementary being assigned to monitor the lunchroom and recess. You also disagreed with the district's organization of the reading curriculum and the pairing of teachers for our reading program here at Iceland. As I conveyed to you in our conference, I was surprised when Superintendent Honcho reported your comments to me and asked that I investigate and report my findings to him. You had not talked with me about any of these matters prior to appearing before the school board.

As a result of our conference, I have prepared the attached report to Superintendent Honcho concerning the matters you raised. As stated in the report, we have been able to resolve the concern you have about lunchroom and recess monitoring, and you have advised me that you understand that under the present curricular plan for reading the current pairing of teachers is reasonable. The one area I was not able to resolve relates to the organization of the district's reading curriculum. That is a district policy decision and not mine. While I do not agree with your concerns, I have passed your concerns on to Dr. Problem Solver, Deputy Superintendent, for his consideration. You should feel free to talk with him about your thoughts on the reading issue, and if you would like, I will be happy to arrange a meeting.

As you and I discussed at our conference, I recognize your right to speak to other members of the administration and the board about these matters and any others which arise at Iceland which are of a public concern. I am here to deal with your problems and concerns which arise, and I would appreciate your discussing any problems you have with me. If I can resolve them, I will endeavor to do so, and if I cannot, I will refer

you to someone who can. If you feel I have misapplied some policy to you and we cannot resolve it, you can file a grievance.* If, however, the concern you have is not a grievance, you may certainly talk with Ms. Susie Stamina, the assistant superintendent for elementary schools. If you expect me to help you, you must come to me with your concerns. I am here to work with you for the betterment of Iceland and for the benefit of the children.

If you have any questions concerning the content of this memorandum, or if you disagree with the facts or conclusions stated in it, please advise me in writing no later than [Date], so we can meet and work out any remaining differences.

/s/
Don DoRight

I have received a copy of this memorandum. I understand that my signature does not necessarily constitute agreement with its contents and that I have an opportunity to respond.

/s/
Paula Public

Date

cc: Personnel File

*Some districts write these complaints through a complaint process which is less formal than the grievance process. See Appendix C.

APPENDIX B

Sample Summary Memorandum (Recognizing First Amendment Rights and Directive to Perform Assigned Duties)

To: Ronnie Rascal

From: Pricilla Principal

Date: September 16, 1986

Re: Conference of September 15, 1986

You and I had a conference on November 15, 1986, to discuss several matters related to your performance as an assistant principal at Old Line High School and my relationship to you as the principal. I initiated the conference to discuss hall monitoring procedures and the school's policy regarding lesson plans of teachers. In connection with each of these areas, I gave you specific directives for action and improvement.

1. Hall monitoring procedures. As we discussed, Old Line High School has a long standing policy of strict enforcement of hall passes for students. All administrators are required to ask students for their passes when students are in the hall during class. You and I discussed this on January 6, 1986, and May 2, 1986, at which times I reminded you of your responsibility under this policy. On none of the three occasions did you tell me you would not follow the policy, but you did not say that you would. On eight different occasions you did not ask students for their passes: January 4 and 5, April 10 and 15, May 1 and September 3, 4 and 13, 1986. Your duty as assistant principal is to ask students for their passes, and if they do not have them, you are to take the students back to the room, determine their status and prepare a report if the student did not have permission to be in the hall.

2. Lesson plans of teachers. Beginning with this school year on September 2, 1986, you told me you felt that requiring teachers to turn in lesson plans by 4:00 p.m. on each Friday for the next week was dinosauric and unnecessary. You have failed to review the lesson plans of the freshman class teachers as I asked you to do at the beginning of school. You must do as I asked you to do concerning these lesson plans.

At our conference of September 15, you accused me of harassing you on these matters because you have been attempting to organize the assistant principals to seek collective bargaining with the board. I want to assure you again, as I did on September 15, that I fully recognize your

right to attempt to organize the assistant principals and to make speeches to the school board about collective bargaining and other issues related to school which are of a public concern. These are my rights also, and I hold them in the highest regard.

If you continue to feel that I am harassing you due to your exercise of your protected constitutional rights, it would be my suggestion that you file a grievance.* As you know, the District's grievance policy provides for the filing of a grievance when an employee feels his or her rights of speech and association are being violated. By filing such a grievance your concerns can ultimately be heard by administrators who are not associated with you on a daily basis, and your concerns can ultimately be heard by the school board. I urge you to use this process if you continue to have the concerns you expressed to me in our conference, and if you do not, I will consider the matter resolved.

Your involvement in these activities and your feelings about lesson plans do not, however, relieve you of your responsibility to perform your assigned duties as you and I have discussed. I want to work with you to achieve and maintain a successful operation at Old Line, but you simply must follow these directions outlined in this memorandum. If you do not, I will have no choice but to recommend to the superintendent that you be subjected to disciplinary action, including possible termination.

If you have any questions concerning these directives, or if you disagree with the facts or conclusions stated in this memorandum, please advise me in writing no later than [Date], so we can meet and work out any remaining differences.

/s/
Pricilla Principal

I have received a copy of this memorandum. I understand that my signature does not necessarily constitute agreement with its contents and that I have an opportunity to respond.

/s/
Ronnie Rascal

Date

cc: Personnel File

*Some districts route these complaints through a complaint process which is less formal than the grievance process. See Appendix C.

APPENDIX C

Grievance and Complaint Definitions and Concerns Policy Which Include the First Amendment Allegations*

Grievance Definition

"Grievance" is a dispute or disagreement alleging a violation of a specific policy of the board of regents or a specific administrative procedure applied to a grievant which is related to wages, hours or conditions of work. A grievance also includes specific factual allegations of discrimination in employment based upon sex, race, age, religion, national origin or handicapping condition, or upon the exercise of first amendment rights.

To be a grievance under this policy, the specific factual allegations must state a prima facie case of the illegal discrimination based upon race, sex, age, national origin or handicapping condition or a violation of the grievant's first amendment rights. A grievance must have a remedy.

The non-renewal of an employment contract shall not be subject to this grievance procedure except when an employee makes specific factual allegations that the non-renewal of employment was in violation of his or her constitutional or civil rights.

Employee performance evaluations are not subject to this grievance procedure.

Concerns which do not fall within this definition of a grievance may be presented through the Concerns Policy.

Concerns Policy

The grievance policy provides a formal means for the processing of a grievance. Occasionally an employee will have a concern or a problem which is not within the definition of a grievance which deserves the attention of the administration. For the most part, these concerns are of an administrative nature which can be resolved through an informal process without the involvement of the board. Although the following list is not made by way of limitation, concerns which fall within these specific areas may be brought to the administrator's attention through the concern process.

a. Concerns which do not fall within the grievance policy's definition of a grievance.

b. Employee performance evaluations or reviews.

c. The non-renewal of any employment contract.

d. Specific factual allegations of discrimination in employment based upon sex, race, religion, national origin or handicapping condition, or upon the exercise of the first amendment rights.

Employee concerns of the nature described above may first be presented to the employee's immediate supervisor. If the matter is not resolved to the employee's satisfaction by the immediate supervisor, the employee may discuss the matter with the appropriate successive administrators until the employee has been satisfied or after the Superintendent or his or her designee has met with the employee. Employee concerns which are presented through this informal process shall terminate with the superintendent with no appeal to the board. However, employees who continue to have an unresolved concern may appear before the board under the policy for hearing of citizens.

---

*The first amendment allegations would be included in the grievance policy or the concerns policy but not both.